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In The

Supreme Court of the United States

October Term, 1993

STEPHEN A. KNOX,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

I. Whether there can be an "exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(E) where the genitals and pubic area are fully covered by an article of clothing.

II. Where no other prosecution has ever been brought and no other arrest has ever been made charging an exhibition of the genitals which were fully covered by an article of clothing, and the defendant knew that the videotape contained no nudity and was told that the videotape was therefore legal, did the government introduce sufficient proof of *scienter* to support a guilty verdict?

III. Where no other prosecution has ever been brought and no other arrest has ever been made charging an exhibition of the genitals which were fully covered by an article of clothing, is an objectively reasonable belief in the legality of the depiction a valid affirmative defense?

IV. Assuming *arguendo* that there can be an "exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(E) where the genitals and pubic area are fully covered by clothing, is 18 U.S.C. § 2256(2)(E) unconstitutionally vague and overbroad?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported in *United States v. Knox*, 977 F.2d 815 (3d Cir. 1992). PA 1-25.[1] The opinion of the district court denying Knox's pretrial motion is reported at 776 F. Supp. 174 (M.D. Penn. 1991).

JURISDICTION

The United States Court of Appeals for the Third Circuit entered judgment on October 15, 1992, affirming petitioner Stephen A. Knox's conviction for receipt and possession of child pornography as proscribed by 18 U.S.C. § 2252 *et seq.* A petition for a writ of certiorari was filed within ninety (90) days of judgment by the Third Circuit, and certiorari was granted on June 7, 1993. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, § 2252(a)(2)[2] and (a)(4)(B) provide in pertinent part:

(a) Any person who –

(2) knowingly receives . . . any visual depiction that has been mailed . . . in interstate

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[1] "PA" is Appendix to the Petition for Certiorari. (A is a citation to the Appendix filed in the Third Circuit.)

[2] This statute was recently held to be unconstitutional on its face *United States v. X-Citement Video, Inc.*, 982 F.2d 1285 (9th Cir., 1992).

or foreign commerce, or which contains materials which have been mailed . . . if –

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(4) either –

(B) knowingly possesses 3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed . . . in interstate or foreign commerce, or which was produced using materials which have been mailed . . . if –

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct:

shall be punished as provided in subsection (b) of this section.

Title 18, United States Code, § 2256(2) provides in pertinent part:

For the purposes of this chapter, the term –

(2) "sexually explicit conduct" means actual or simulated –

(A) sexual intercourse . . . ;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic abuse; or

(E) lascivious exhibition of the genitals or pubic area of any person;

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner Stephen A. Knox was convicted on one count of receiving depictions of minors engaged in "sexually explicit conduct" under 18 U.S.C. § 2252(a)(2) and § 2256(2)(E) and one count of possessing three or more items containing a depiction of minors engaged in "sexually explicit conduct" under 18 U.S.C. § 2252(a)(4)(B) and § 2256(2)(E), based solely on three videotapes containing videotaped sequences sold by a Nevada-based company, Nather, Inc. ("Nather").

Although none of the minors depicted in the videotapes were shown to be engaged in any actual or simulated sexual conduct as proscribed by 18 U.S.C. § 2256(2)(A), (B), (C), or (D), and all genitals were fully covered, the district court agreed to decide – and then denied – a pretrial motion to dismiss based upon the contents of the videotapes. The underpinning of the district court's denial was a finding that the uppermost portion of the inner thigh was the "pubic area". Since the pubic area was exposed (nude), the district court reasoned, a prosecution based on an exhibition of the pubic area – not the genitals – was statutorily authorized:

> Although in every instance the girl's genitals were covered by either underpants or a bathing suit, the area in close proximity to the genitals, specifically the uppermost portion of the inner thigh area closest to the girl's genitals, was clearly exposed.

United States v. Knox, supra, 776 F. Supp. at 180.

At a subsequent bench trial, the trial judge found that the "exhibitions" were "lascivious" and had been received by Knox in the mails. Knox was convicted and, on February 13, 1992, sentenced to the mandatory minimum sentence of five (5) years imprisonment.

On October 15, 1992, the Third Circuit found the district court in error because "[d]isplaying any portion of the inner thighs does not constitute an exhibition of the pubic area under 18 U.S.C. § 2256(2)(E)." *United States v. Knox, supra,* 977 F.2d at 819-820. (PA 9). However, the Third Circuit affirmed Knox's conviction, holding that displaying *fully covered* genitals *does* constitute an "exhibition" under 18 U.S.C. § 2256(2)(E).

B. Statement of Facts

1. The Defendant

Petitioner Stephen A. Knox is an honors graduate student working on his doctorate in history at Pennsylvania State University, where he has maintained a 4.0 average since his admission in the Fall of 1990. (A 81). He graduated summa cum laude in 1986 with a bachelors degree from Temple University. (A 80). Knox was described by his graduate adviser, Dr. Nan Elizabeth Woodruff, as a serious student who has, throughout his

case, maintained the rigorous work load required of him. Dr. Woodruff attested to the fact that Knox "easily ranks among [the] top five graduate students" at Penn State. (A 82). Similarly, Professor William A. Blair found Knox to have "enriched the graduate community at Penn State" and to have taken substantial initiative in gaining a mastery of his subject matter. Professor Blair also noted Knox's high motivation to achieve success in his chosen profession as an historian and the equally high likelihood that he will do so. (A 83).

Although Knox was previously convicted for receiving "child pornography" sold to him by a government sting operation, he has carefully and faithfully obeyed the terms of his probation, which has included attending therapy sessions on a regular basis. Relying heavily on the psychological evaluation of Dr. Fred Covan, Chief Psychologist at Bellevue Hospital in New York (A 84 to 88), the trial judge concluded that there is *"absolutely no evidence of any inclination by the defendant of untoward conduct toward anyone else"* and granted Knox bail pending appeal. (Emphasis added.) (ST 28 to 29)[3]

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[3] Three transcripts comprise the entire record in this case. Testimony and argument on the motions on August 28, 1991, are contained in the motion transcript, or "MT". The November 14, 1991, trial has the usual designation of "T". Sentencing and argument on the post-trial motions on February 13, 1992, are contained in the sentencing transcript, or "ST".

2. The Videotapes

Each of the three two-hour-long videotapes[4] seized from Stephen Knox's home consists of up to several dozen sequences from a few to fifteen minutes in length. The sequences are "dubs" from videotapes sold by Nather, as evidenced by Knox's hand-written notations on each of the videotape boxes reflecting numerous titles advertised in the Nather brochures, and as demonstrated by the fact that the length of each videotape sold by Nather is considerably less than two hours.[5]

Shown in the videotaped sequences are apparently amateur models in poses no different from what one would commonly find in fashion magazines[6] or see on television in gymnastics meets, or on *Star Search* or *America's Funniest Home Videos*. There are also depictions of children horsing around, sitting in parks, and swinging on swings. The children's costumes and leotards, short shorts and skimpy bathing suits (worn by the older teenage models), frilly socks, and the biker shorts with lace trim[7], are utterly commonplace in American society and appropriate to the ages of the minors wearing them.

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[4] The three videotapes and the boxes containing Knox's handwritten notations were marked into evidence and made part of the record as Government Exhibits 5, 6, and 7, respectively. (MT60).

[5] *See* the Nather brochures marked into evidence as GX-1 and made part of the record. (T9).

[6] Fashion magazines, such as *Vogue* and *Seventeen*, routinely feature teenaged girls "alluringly" posed in order to sell a variety of clothing and other products.

[7] Knox erroneously labeled these on one of the videotape boxes as "sexy garters". *See* videotape marked Nather #3, made part of the record at MT60.

Except for one sequence (discussed below), no girl depicted in the videotapes is engaging in conduct which could be characterized as overtly sexual. Any sexuality is implied, sometimes by the natural or feigned sensuality of the models, sometimes by the models' manner of dress (e.g., the skimpy bathing suits and short shorts of the older teenagers), and by the videographer's "zooming in" on the girls' uncovered legs and the clothing covering the genitals, buttocks, and breasts. The "pantie [sic] flashes" which Knox noted on the videotape boxes are nothing more than a model fluffing the hem of her skirt or the videographer moving lower or shifting position in an attempt to catch a glimpse of her underwear. In reality, the minors in the tapes are doing nothing (at the direction of anyone else or of their own accord) which anyone standing five feet away would consider "lascivious" or overtly sexual.

The only sequence in the videotapes in which a girl intentionally opens her legs to show her panties is an excerpt from the French movie, *Le Grande Chemin* (The Grand Highway – 1988), a general release (not an "adult") movie which had a successful run at foreign film houses throughout the United States and is available for home viewing on videocassette at most major video outlets.[8] There is no question but that the 11-year-old girl in *Le Grande Chemin* was directed to spread her legs in order

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[8] The sequence is contained on the videotape marked *Nather* #2, made part of the record during the pre-trial hearing as Government's Exhibit 6. (MT60)

to show her panties – as witnessed by the dialogue, translated in the subtitles which flash across the screen (and are reported here verbatim):

Dirty boy! Why do you always stare at my pants?

I don't. You keep showing them.

Liar! I saw you when I was in the tree! Admit it, you're curious! You've never seen a girl's wee wee, I bet!

Yes I have.

I bet you haven't! Want me to show you?

Yours? Are you kidding?

Come and see! Free of charge! Promise not to tell a soul!

The fact that this sequence was excerpted from a popular film highlights both the vagueness and overbreadth problems which arise from the Third Circuit's expansive interpretation of 18 U.S.C. § 2256(2)(E).

3. The Pretrial Motion

The district court granted a pretrial hearing on the issue of whether the three videotapes could be found to depict minors engaging in "sexually explicit conduct" under the statute, despite the fact that the minors' genitals were completely covered by clothing. Because the defendant waived his right to a jury trial, the Court agreed to rule upon an issue usually reserved for trial. *Knox, supra,* 776 F. Supp. at 178-179. The trial court observed that "[t]his is a case of first impression." *Id.* at 180. The government conceded at the hearing (MT 66 to

69) and has conceded throughout this litigation that this is the very first prosecution based upon an exhibition of the genitals or pubic area covered by clothing. (*Brief for the United States in Opposition to Petition for Certiorari*, p. 10). It is undisputed that nude genitals are never depicted in the three videotapes.

The trial judge acknowledged that the government's theory at trial rested upon an exhibition of the pubic area, rather than the genitals. In denying Knox's pretrial motion, the judge adopted a scientifically incorrect view that the uppermost portion of the inner thigh was part of the "pubic area" and – since the inner thigh was exposed (nude) – found that the three videotapes contained an "exhibition" under § 2256(2)(E). The court left for trial its determination of whether the exhibitions were "lascivious". *Knox, supra*, 776 F.Supp. at 180.

4. The Bench Trial

At the bench trial on November 14, 1991, all of the testimony and exhibits on the motions to suppress and dismiss were incorporated for purposes of the trial. (T 3). The government introduced advertisements and a catalog for videotapes from Nather, with an address in Las Vegas, Nevada. The government offered envelopes, found at Knox's apartment, which bore Nather's address. These envelopes were printed and provided by Nather to be used in ordering material. A $62 Traveller Express money order to Nather, dated June 4, 1990 (twenty-two (22) months prior to the dates on which the indictment alleged the crime was committed) was also introduced. (T 6 to 7).

The government's sole witness, a Customs agent, testified that Knox had rented a mail box at Mail Box Etc. under the name of J. Richard Scott, several months *after* the money order to Nather was written. (T 7 to 9). On cross-examination, the agent acknowledged the possibility that the videotapes seized from Knox's apartment were "dubs", i.e. not the original tapes made and distributed by Nather. (T 11). The agent also acknowledged that he had no evidence that any materials were ever received by the defendant at the mail box. (T 12).

The defense offered into evidence various issues of *Video Magazine*, which contained Nather advertisements (T 15 to 16). The government offered copies of Nather brochures, seized from Knox's apartment, which proclaimed that the tapes were legal and contained no nudity or sexually explicit conduct. (MT 51). The defense argued in summation that the government had failed to prove the element of mailing, the necessary *mens rea*, and adopted the other arguments previously made at the pretrial hearing. (T 17 to 20).

5. The Verdict

The court filed a written pleading on November 15, 1991, finding the defendant guilty on each count (without reasons), ordered a pre-sentence investigation, and set sentencing for February 13, 1992, at 1:00 p.m.

6. Post-Trial Motion

Prior to sentencing, Knox filed a motion for verdict of acquittal or, in the alternative, for a hearing to explore

further "the relationship of the medical and anatomical authorities to the intent of Congress" (A 51 to 55). The motion was supported by an affidavit of Dr. Todd Olson, Director of Human Gross Anatomy at the Albert Einstein College of Medicine, establishing the indisputable fact that the uppermost portion of the inner thigh is not the pubic area.

The trial judge denied the motion (A 58 to 60), and sentenced Stephen Knox to the minimum mandatory five (5) year term. (ST 22 to 24).

7. The Government's Shifting Theories

In Stephen Knox's opening brief to the Third Circuit, the issue upon which the Third Circuit decided the case and upon which this Court granted certiorari – whether genitals which are covered by clothing could be an exhibition within the meaning of 18 U.S.C. § 2256(2)(E) – was not even addressed. Nothing in the litigation in the District Court suggested that the government had urged such a position. In the *responding* brief to the Circuit, the government obliquely raised the issue, which was then addressed for the first time by Knox in his reply brief.

> Throughout its response, whether by accident or design, the government implicitly *assumes* there can actually be an 'exhibition' of the genitals or pubic area as required by 18 U.S.C. § 2256(2)(E) without nudity. When that assumption is finally articulated, the government provides no jurisprudential support. The government's entire argument is expressed in one sentence: '[N]or can it be seriously contended that there cannot

> be a lascivious exhibition of the genital area absent nudity.' (Rb 35-1). (Footnote omitted).

Reply Brief at 1[9].

SUMMARY OF ARGUMENT

Petitioner Stephen A. Knox was convicted for receipt and possession of three videotapes which contain depictions of a type which no court anywhere (either state or federal) has ever found criminal since the first federal child pornography laws took effect on February 1, 1978, fifteen years ago. The government has conceded that this is the first prosecution where it has been alleged or argued that genitalia that are completely covered by clothing can still be "exhibited".

The Third Circuit's admittedly expansive interpretation of 18 U.S.C. § 2256(2)(E)'s term "exhibition of the genitals or pubic area" to include images of minors whose genitals and pubic areas are fully covered by clothing avoids the plain meaning of the statute, violates the Rule of Lenity, contravenes the legislative history, and creates a vague and overbroad interpretation of that criminal statute.

The meaning of the word "exhibit" is clear. "To exhibit" means to show or present to view, to expose. "Expose" means to uncover or bare to the air. The antonym for "exhibit" is to conceal, which means to cover

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[9] "Rb" refers to the government's responding brief in the Third Circuit. "Reply brief" refers to Petitioner's Reply brief in the Third Circuit.

or keep from sight. Thus, covered genitals cannot be exhibited. An "exhibition of the genitals" "even when those areas are covered by an article of clothing" is literally a contradiction in terms and does violence to the plain meaning of the statute.

The legislative history of 18 U.S.C. § 2256(2)(E) makes it clear that Congress has always considered nudity to be a requirement before depictions could be found to be criminal. The entire legislative discussion demonstrated that proscribing "mere nudity" was too drastic a measure and that Congress sought a more limiting definition to limit an "exhibition". Congress thus limited the *type* of nudity criminalized by the statute by proscribing only "exhibitions of the genitals or pubic area" and adding the word "lewd" (later amended to "lascivious"). It is beyond obvious from a review of the legislative history that the statute passed by Congress was meant to narrow the category of depictions which fell under the statute's proscription, not to broaden it.

The Third Circuit admitted its definition of "exhibition" was expansive. *United States v. Knox, supra,* 977 F.2d at 823 (PA 19). The Rule of Lenity, intended to prohibit a judicial construction which criminalizes conduct beyond what Congress specifically intended, prohibits the expansive definition of "exhibition" adopted by the Third Circuit.

The Rule of Lenity is also designed to give fair notice to citizens of what conduct is criminal. The government has zealously enforced the child pornography statutes since they were first passed some fifteen years ago. Yet, this is the very first prosecution ever undertaken under

the theory that there can be an "exhibition" of genitalia which are completely covered by clothing. The result is that Knox has been convicted of conduct neither he nor anyone else could possibly have known was criminal.

In finding Knox guilty of "knowingly" receiving and possessing "child pornography", the Third Circuit applied a standard of *scienter* which is inapplicable to the facts of this case. Because Knox knew that the tapes contained no sexually explicit conduct violating 18 U.S.C. § 2256(2), (A), (B), (C), and (D), and no nudity, he had an objectively reasonable belief that they contained no lascivious exhibitions of the genitals, 18 U.S.C. § 2256(2)(E) and were therefore legal, not child pornography.

Given the substantial First Amendment rights at stake, the serious penalties faced by defendants convicted for child pornography crimes, the enormous social stigma attached to those even accused of the crime, and the widespread chilling effect on protected First Amendment conduct, such an overbroad reading of the child pornography statute cannot constitutionally stand.

The Third Circuit's expansion of the child pornography law will have a chilling effect upon legitimate publishers and contravenes the limitations on such laws set forth in *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). Worse, the government will have an unlimited charging power. Depictions of minors in bathing suits, leotards, shorts, underwear, and other similar clothing are created every day and may be found everywhere throughout society. The Third Circuit's decision places such depictions into a "grey area" where a

decision to prosecute may rest on the government's subjective view of the potential defendant, and is limited only by a "far from crystal clear" requirement of "lasciviousness". *United States v. Knox, supra,* 977 F.2d at 823 fn. 5. (PA 19).

ARGUMENT

A. There can be no "exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(E) where the genitals and pubic area are fully covered by an article of clothing.

The depictions of minors contained on the Nather tapes clearly fall outside the "hard core of child pornography" at which the federal law is directed. *New York v. Ferber, supra,* 458 U.S. at 773, 102 S.Ct. at 3363. It is not open to dispute that the videotapes in *Knox* did not depict "sexually explicit conduct" as defined in 18 U.S.C. §§ 2256(2)(A) through (D). Neither is there any depiction of nudity, even in part, of the genitals or pubic area of any person. As both the District Court and Third Circuit decisions emphasize, in every instance in the Nather tapes, the minors' genitals are fully and opaquely covered by an article of clothing.

It must be reemphasized that there is nothing inappropriate about the bathing suits, leotards, costumes, school uniforms, skirts or dresses worn by the subjects in the Nather tapes. The minors are dressed in the manner one commonly sees them in school or at play, walking down the street, performing gymnastics, or swimming.

1. The "Plain Meaning" of the Statute

18 U.S.C. § 2256(2)(E) defines "sexually explicit conduct" to include a "lascivious exhibition of the genitals or pubic area of any person". If the word "exhibition" has any meaning at all, it is that the object being "exhibited" must actually be seen. "Exhibition" means "an exhibiting, showing or presenting to view," and "exhibit" means "to offer or *expose to view*; present for inspection". (Emphasis added). *Random House Dictionary of the English Language* (Unabridged), 1979. "Expose" means "to uncover or bare to the air, cold, etc.; to present to view, exhibit, display," and "view" means "to see, behold". *Id.* The sole antonym listed in the *Random House Dictionary* for "exhibit" is "conceal," a word which means "to *cover* or keep from sight." *Id.* (Emphasis added). From these definitions, the conclusion is inescapable that the statute proscribes only depictions in which genitals or pubic areas are exposed to view, uncovered, or bared to the air. Genitals which are concealed – that is, fully covered by an article of clothing – cannot, by definition, be exhibited. Thus, the Third Circuit's finding that § 2256(2)(E) criminalizes "exhibitions" of the genitals or pubic areas "even when these areas are covered by an article of clothing" is literally a contradiction in terms. *United States v. Knox, supra,* 977 F.2d at 825 (PA 24).

Had the Third Circuit applied the plain meaning of the word "exhibition", rather than giving the term an admittedly "expansive" interpretation[10], it would have concluded that some exposure of the genitals or pubic

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[10] See *United States v. Knox, supra,* 977 F.2d at 823. (PA 19).

area – that is, full or partial nudity – is a prerequisite for the occurrence of an exhibition. One could not conceive of an "exhibition" of sculpture or painting in which all the artwork was fully and opaquely covered, incapable of being viewed. Likewise, there can be no "exhibition of the genitals or pubic area" where these parts of the body are covered by clothing.

The Third Circuit's characterization of the federal statute as criminalizing "clothed and unclothed visual images of a child's genitalia if they were lewd" (PA 12a) or "scantily clothed displays of the genitals" (PA 19a), highlights both a semantic and a logical problem with that court's decision. It is not visual images or displays which are clothed or nude, but genitals themselves. The Third Circuit's reasoning would require that the term "clothed and unclothed" denote types or subsets of "genitals" – which is clearly not the case. Nor does "clothing" form a part of the genitalia. Under the federal statute, it is only depictions of genitals which can be proscribed, if such depictions are also found to be "lascivious". Concealing the genitals under clothing therefore prevents the application of the federal statute, regardless of whether the manner of concealment might be deemed to be "lascivious" in nature.[11]

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[11] The Third Circuit's use of the phrase "scantily clad" in describing the clothing of the minors depicted in the Nather tapes is clearly rhetorical, as the garments worn by the models are generally socially-acceptable and age-appropriate.

2. The Legislative History

The legislative history of 18 U.S.C. § 2252 *et seq.* makes absolutely clear Congress' intent to criminalize only those depictions of children whose genitals or pubic areas were nude *and* who were engaged in exhibiting their genitals or pubic areas in a "lewd" (now "lascivious") manner.

The original legislative proposal introduced by Senator Roth in 1977, S. 1011 (the "Roth" bill), would have criminalized "nudity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction." That provision was roundly criticized by lawyers who testified before Congress, as well as by the Justice Department. A letter dated June 14, 1977, from Assistant Attorney General Patricia Wald to Senator Eastland, then-Chairman of the Committee on the Judiciary, specifically recommended that

> The term "nudity . . . depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction" is also troublesome. This definition differs from the "average person" test for obscene material set forth in *Miller v. California, supra,* and it would be difficult to determine by what standard the "sexual stimulation or gratification" could be assessed. We would suggest as an alternative definition "lewd exhibitions of the genitals," a phrase used by the Chief Justice in *Miller v. California, supra,* to describe one of a variety of types of conduct which could be prohibited under state obscenity statutes. Congress could make clear in the legislative history of the bill

> *what types of nude portrayals of children* were intended to be encompassed within this definition.

(Emphasis added.) *Protection of Children Against Sexual Exploitation,* Hearings before the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary, United States Senate, 95th Congress, First Session, May 27, June 16, 1977, pp. 77-78.

Congressman Edward I. Koch also warned that he would not endorse the nudity standard proposed in the Roth bill because he was "concerned about the breadth of [that] term." *Congressional Record,* House, E. 3419 (daily ed. June 1, 1977) (statement of Rep. Koch).

The Justice Department recommendation to narrow the proposed ban on nudity was adopted by Senators Mathias and Culver in drafting S. 1585 (the "Mathias-Culver" bill). The difference between the Roth and Mathias-Culver bills was the subject of University of Pennsylvania Professor Paul Bender's extensive testimony before Congress. Professor Bender, also former general counsel to the President's Commission on Obscenity and Pornography (1970), testified why the Mathias-Culver bill was preferable to the Roth bill vis-a-vis 18 U.S.C. § 2256(2)(E):

> Most importantly, is the definitional section of the Roth bill. It uses the conduct which it prohibits as having children engage in prohibited sexual acts and then it defines the prohibited sexual acts in a number of ways. Most of these definitions are okay. But some of them strike me as vague and so vague as to perhaps be unconstitutional. . . . The nudity provision is a little bit

> troublesome also. It says, "nudity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction." I have a problem with that in knowing whose purpose they are talking about and when that has to be the purpose. Is the notion of this that the person taking the picture has to take the picture for the purpose of stimulating or gratifying someone else sexually, or is it enough if the picture is simply used that way for that purpose by somebody later, even if that was not the purpose of the person who took the picture?
>
> Nudity generally, I think, may be a bit overbroad in terms of the purposes of the legislation. I would not want to classify as child abuse anyone who takes a picture of a child without any clothes on. Lots of people do that of their children. They send it to the child's grandparents in interstate commerce. I don't think you would want to cover that. *So I think it's right to qualify "nudity." But this qualification [in the Roth bill] strikes me as vague."*

(Emphasis added.) *Protection of Children Against Sexual Exploitation*, Hearings, *supra*, p. 103.

In other words, Professor Bender understood the phrase "lewd exhibition of the genitals," contained in the Mathias-Culver bill, as a qualification – and a narrowing – of the broader term "nudity". It was, *in fact*, a qualification and a narrowing, because by limiting the scope of the proscription on nudity to "lewd exhibition of the genitals or pubic area," Senators Mathias and Culver ruled out banning other types of nude portrayals, e.g.

those which were merely nude "without more" or those in which breasts or buttocks were lewdly exhibited.

Given this legislative history, the Third Circuit's claim that Congress "omitted any reference to nudity in the legislation that was enacted" and therefore "intended to criminalize both clothed and unclothed visual images of a child's genitalia if they were lewd" is disingenuous at best. In passing the Protection of Children Against Sexual Exploitation Act of 1977, Congress adopted the Mathias-Culver language ("lewd exhibition of the genitals") rather than the Roth language ("nudity, for the purposes of sexual stimulation . . . ") precisely because the Mathias-Culver language delineated, as "sexually explicit conduct", a sub-category of nudity to be proscribed. Congress has never acted to expand that proscription.

As used in the statute, the phrase "lewd exhibition of the genitals" has a common sense meaning: it refers to a type of sexual conduct on the part of the model depicted which is designed to exhibit and draw attention to his or her genitals. Such was the understanding of members of Congress and witnesses who appeared before it in hearings in 1982, when Congress was considering amending the child pornography statute in light of *New York v. Ferber* to remove the requirement that depictions of minors engaged in "sexually explicit conduct" be obscene in order to be proscribed. Senator Specter, mindful of the problems of constitutional overbreadth which might be posed by an outright ban on non-obscene depictions of "lewd exhibition[s] of the genitals or pubic area," proposed that such exhibitions continue to be protected if they possess literary, artistic, or scientific merit.

In discussing this proposal, Bruce Rich, on behalf of the Association of American Publishers, suggested that the exception should apply to the entire range of "sexually explicit conduct," not merely to "lewd exhibitions of the genitals." Mr. Rich, like the members of Congress who were considering changes in the law, correctly assumed that the phrase described a *type* of nudity:

> We say, first, that it is not enough merely to tag on the literary, etc., exception to *exhibitions of nudity*, as Senator Specter's own proposal would suggest. . . . We would suggest having the literary, artistic, etc. exemption to modify the entire range of conduct which would be otherwise prohibited.

Child Pornography, Hearing before the Subcommittee on Juvenile Justice of the Committee on the Judiciary, United States Senate, 97th Congress, December 10, 1982. Serial No. J-97-152, pp. 19-20.

Robert Pitler, Bureau Chief, Appeals Bureau, District Attorney's Office for New York County, who argued the *Ferber* case before the Supreme Court and afterwards on remand to the New York Court of Appeals, also understood "lewd exhibition of the genitals" to encompass nudity when, during the Congressional hearings, he criticized the arguments of *amici* in the *Ferber* case. The term "lewd exhibition of the genitals," Mr. Pitler observed,

> means more than mere nudity and describes a patently offensive, lascivious, lustful or obscene display. . . . [A]mici publishers, for the most part, based their conclusion on a misunderstanding of the term "lewd exhibition of the genitals," which, as noted, does not include mere nudity.

Child Pornography, Hearing before the Subcommittee on Juvenile Justice of the Committee on the Judiciary, United States Senate, 97th Congress, December 10, 1982. Serial No. J-97-152, pp. 111-113.

In 1986, when Congress again contemplated amending the child pornography laws, comments by Senator Roth accurately reflect that what Congress had intended to criminalize in 1977 were *nude* depictions of a certain character. Senator Roth, speaking in support of H.R. 5560, the "Child Sexual Abuse and Pornography Act of 1986," the House counterpart to his bill, S. 2398, correctly referred to "child pornography" as "photos, films and videotapes depicting *nude* young children *engaged in explicit sexual behavior*". (Emphasis added.) *Congressional Record*, Senate, S. 17296 (daily ed. October 18, 1986) (Statement of Sen. Roth).

The Supreme Court has used the phrase "lewd exhibition of the genitals" to denote exhibitions where the genitals are visible, i.e., nude, and in which the subject is engaging in some sort of conduct intended to draw attention to his or her exposed genitals in a sexual manner. In *New York v. Ferber*, *supra*, 458 U.S. at 762-3, 102 S.Ct. at 3357, Justice White observed that

> It is unlikely that visual depictions of children . . . lewdly exhibiting their genitals would often constitute an important and necessary part of the literary performance or a scientific or educational work.

Nowhere in the entire legislative history of the child pornography laws, as amended over a period of fifteen years, is there *any* discussion by *anybody* which would

indicate that videotapes which depict minors whose genitals are completely covered could be criminalized. Moreover, all of the discussions regarding "lewd" or "lascivious exhibition of the genitals," reflect a consensus that the phrase was intended to narrow the type of nudity which was to be criminalized.

3. Precedent

In fifteen years of zealous enforcement of the federal child pornography laws, no person other than Stephen A. Knox has been indicted or convicted for receiving or possessing depictions of minors whose genitals and pubic areas are fully covered by clothing. Nor has any person been indicted or convicted for producing such depictions. Even if it could be argued that the plain wording of the statute proscribes depictions of minors whose genitals and pubic areas are fully covered by clothing, the fact that there have been no prosecutions other than that of Stephen A. Knox[12] demonstrates that such is not the general understanding of the Department of Justice, law enforcement officials, U.S. Attorneys, and the public at large. This is especially true, where, as here, the very producer and seller of the vignettes contained on the videotapes in question carried out its business openly and for at least several years through nationally-prominent publications without suffering criminal prosecution. (T.13-16 to 14-17.)

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[12] The government concedes that this is the sole prosecution for depictions of minors whose genitals and pubic areas are fully covered. *Brief for the United States in Opposition to Petition for Certiorari*, p. 10.

The sole authority relied upon by the Third Circuit for holding that depictions of minors whose genitals are fully covered may be proscribed under § 2256(2)(E) is *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986) *aff'd sub. nom. United States v. Wiegand*, 812 F.2d 1239 (9th Cir.), *cert. denied*, 44 U.S 856 (1987). In *Dost*, the court outlined six factors "among any others that may be relevant in the particular case" in determining whether an exhibition of the genitals or pubic area is "lascivious". *Id.* at 832. Those factors included such considerations as where and by whom the photograph was taken, the focal point of the image, and the demeanor of the subject. The fourth *Dost* factor, "whether the child is fully or partially clothed, or nude," according to the Third Circuit, "rests on the implicit assumption that a clothed exhibition of the genitals is criminalized under the statute." *Knox, supra*, 977 F.2d at 823. (PA 17).

The Third Circuit's conclusion is based on a number of errors. Depictions of clothed minors were never at issue in *Dost* and any discussion of the fourth *Dost* factor is, at best, dictum. Both minor subjects in *Dost* were "totally nude": the first was photographed "in a variety of positions . . . with her genitals and breasts fully exposed"; the second was photographed in a contorted pose so that "[h]er pubic area is completely exposed, not obscured by any shadow or body part." *United States v. Dost, supra*, 636 F. Supp. at 833. Furthermore, the *Dost* court's discussion of the fourth factor makes clear its belief that nudity of the genitals or pubic area is a prerequisite for the occurrence of an exhibition:

> For example, consider a photograph depicting a young girl reclining or sitting on a bed, *with a portion of her genitals exposed*. Whether this visual depiction contains a "lascivious exhibition of the

> genitals" will depend on other aspects of the photograph. If, for example, she is *dressed* in a sexually seductive manner, with her open legs in the foreground, the photograph would most likely constitute a lascivious exhibition of the genitals. . . . On the other hand, if the girl is *wearing clothing* appropriate for her age, the visual depiction may not constitute a "lascivious exhibition" of the genitals, *despite the fact that the genitals are visible.*

(Emphasis added). *United States v. Dost, supra,* 636 F. Supp. at 832.

Finally, the *Dost* court considered the fourth factor as relevant only to a determination of whether a given exhibition is "lascivious". The Third Circuit, on the other hand, used the fourth *Dost* factor to determine whether there is an exhibition. The two issues are markedly different:

> In formulating an instruction defining "sexually explicit conduct" under § 2256(2)(E), the Court, of course, must instruct the jury that it must find that the pictures visually depict the minor's genitals or pubic area. This is a threshold element contained in the [statute] itself, distinct from the additional requirement that the depiction be "lascivious".

United States v. Arvin, 900 F.2d 1385, 1391 (9th Cir. 1990).

Thus, the Third Circuit's reliance upon *Dost* to support its finding that nudity of the genitals or pubic area is not required by the federal statute is utterly misplaced.

One of the photographs at issue in *United States v. Villard,* 700 F. Supp. 803 (D. N.J. 1988), *aff'd,* 885 F.2d 117

(3d Cir. 1989), makes clear why a court might inquire whether the subject was "fully or partially clothed, or nude" in analyzing whether an "exhibition of the genitals or pubic area" is a "lascivious" one. That photograph depicted a fully clothed teenage boy, whose erect penis was sticking out one of the legs of his shorts. (See *United States v. Villard, supra,* 700 F. Supp. at 805.) The fact that the boy was fully clothed *and* his genitals were exhibited suggests that the court in *Knox* mistook "clothed" for "covered". That is, as the *Dost* court observed, a minor may be fully clothed at the same time his or her genitals are uncovered, i.e., exhibited. This is easily accomplished by pushing the clothing aside or causing the genitals or pubic area to appear through an opening in the clothing. It is these depictions to which the fourth *Dost* factor are relevant, not to depictions such as those in *Knox* where the subject's genitals are fully covered.

In its *Brief in Opposition to the Petition for a Writ of Certiorari,* the government urges the Court to adopt an interpretation of the federal statute which would permit Knox's conviction to stand on the theory that the depictions constitute "simulated" "sexually explicit conduct".[13] The government, however, is unable to point to

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[13] It should not be lost on the Court that this interpretation of the statute would constitute an entirely new theory on which to find the Petitioner guilty. The District Court's determination that the "uppermost portion of the inner thigh" was part of the "pubic area", the Third Circuit's finding that an "exhibition" could occur without the genitals or pubic area actually being exposed to view, and the Justice Department's new-found "simulated" "lascivious exhibition of the genitals" all should alert the Court to the inherent vagueness which lies in attempting to apply the federal statute to the depictions at issue in *Knox.*

any legislative history which would suggest how the term "simulated" could sensibly be applied to the term "lascivious exhibition of the genitals or pubic area of any person," where the genitals of the minor are fully covered. Rather, it is clear from the background of the statute – aimed as it is at the "hard core of child pornography" – that the concern Congress was attempting to address with the term "simulated" was the potential simulation of the types of conduct set forth in 18 U.S.C. §§ 2256(2)(A) through (D).

Nowhere in the legislative history or in any case has a "simulated" "lascivious exhibition of the genitals" been discussed or described, because there can be no such simulation without nudity. The very act – unlike sexual intercourse, bestiality, masturbation, or sadistic or masochistic abuse – requires that the genitals be shown. If a "simulated" "exhibition of the genitals" can violate the statute, then the statute would no longer be "directed at the hard core of child pornography" and the statute would be broadened beyond any possible Congressional intention. Constitutional concerns about notice, vagueness and overbreadth would be insurmountable. The Rule of Lenity prohibits such a creative and expansive judicial construction.

4. The Rule of Lenity Requires Reversal of Knox's Conviction

Nothing in the statute, the legislative history, or the case law suggests that "child pornography" as defined under § 2256(2)(E), encompasses depictions of fully clothed minors in which neither the genitals nor the

pubic areas are exposed to view. The Third Circuit's interpretation of this criminal statute is admittedly expansive:

> Although our interpretation of an exhibition is *expansive*, the limiting principle in the statute is the requirement of lasciviousness.

(Emphasis added). *United States v. Knox, supra*, 977 F.2d at 823. (PA 19).

Such an expansion of a criminal statute is impermissible and violates the Rule of Lenity, "a rule of statutory construction whose purpose is to help give authoritative meaning to the statutory language." *United States v. Thompson Center Arms Co.*, ___ U.S. ___, 112 S.Ct. 2102, 2110 fn. 10, 119 L.Ed.2d 308 (1992). The "venerable Rule of Lenity" is "rooted in 'the distinctive distaste against men languishing in prison unless the lawmaker has clearly said that they should.' " *United States v. Bass*, 404 U.S. 336, 347-348, 92 S.Ct. 515, 522-523, 30 L.Ed.2d 488 (1971), quoting H. Friendly, *Benchmarks*, 209 (1967). *See also, United States v. R.L.C.*, ___ U.S. ___, 112 S.Ct. 1329, 1338, 117 L.Ed.2d 559 (1992). The Rule of Lenity has two purposes, "the main function of which," as Justice Stevens recently observed,

> is to protect citizens from the unfair application of ambiguous punitive statutes. Obviously, citizens should not be subject to punishment without fair notice that their conduct is prohibited by law.

United States v. Thompson Center Arms Co., supra, 112 S.Ct. at 2114 (Stevens, J. dissenting).

The Rule of Lenity requires "fair warning", in language that the common world will understand, of what the law intends to do if a certain line is crossed. *Liparota v. United States*, 471 U.S. 419, 427, 105 S.Ct. 2084, 2089, 85 L.Ed.2d 434 (1985). *See also, McBoyle v. United States*, 283 U.S. 25, 27, 51 S.Ct. 340, 341, 75 L.Ed. 816 (1931).

If the Court finds that 18 U.S.C. § 2256(2)(E) includes within the meaning of "lascivious exhibition of the genitals or pubic area" a depiction in which the genitals are concealed, then Knox will have been denied the fair warning required by the Rule of Lenity. It would be unreasonable to assume that Knox could have foreseen the divergent expansive interpretations adopted first by the District Court and then the Third Circuit.[14] He had no reason – given the plain wording and the legislative and enforcement histories of the statute – to suspect that his conduct was criminal. See, for example, *Bouie v. City of Columbia*, 378 U.S. 347, 350-352 (1964); *Rabe v. Washington*, 405 U.S. 313 (1972).

The second purpose for the Rule of Lenity is to ensure that lawmakers have genuinely called for punishment to be meted out. "Because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States v. Bass, supra*, 404 U.S. at 348, 92 S.Ct. at 523; *Liparota v. United States, supra*, 471 U.S. at 427, 105 S.Ct. at 2089. The application of the Rule of Lenity to

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[14] Nor could Knox have foreseen the third and completely different expansive interpretation proposed by the government in its *Brief in Opposition to the Petition for Certiorari*, pp. 7-8.

the Third Circuit's interpretation of 18 U.S.C. § 2256(2)(E) is required by the government's concession that no federal prosecution has ever before claimed that genitals may be exhibited at the same time that they are completely covered. The lack of prosecution is certainly not explained by an absence of such depictions in our society or that the government alone was oblivious to them. It seems fundamentally unfair that an individual graduate student who possessed three tapes containing such depictions can be the first and only person ever prosecuted under this interpretation of the statute.

B. The government failed to prove Knox had the requisite *scienter* to violate the statute.

Even assuming *arguendo* that a "lascivious exhibition of the genitals or pubic area" may include exhibitions of minors whose genitals are completely covered, Knox lacked the requisite *scienter* to commit the crime of receiving and possessing "child pornography" because he could not have known that such depictions ran afoul of the statute. This is more than just an excuse that he was ignorant of the law. Given the history of law enforcement in this area and the ubiquity of images of minors whose genitals are completely covered, no person could have believed that such images fell within the definition of "child pornography".

Common understanding of what laws mean encompasses not only the language of the statute itself, but also "the gloss which life has written upon it". *Nashville C. & St. L. Ry. v. Browning*, 310 U.S. 362, 369, 60 S.Ct. 968, 972, 84 L.Ed. 1254 (1940). As Professor Bickel has noted, "[t]he

average nonreader of the statute books knows of the law what he knows of ethics and customs, and for the rest, what he knows of prosecutions." Bickel, 'The Supreme Court – Foreward,' 75 *Harvard L. Rev.* 40, 63 (1961).

The fact that every other prosecution under the statute has involved images of minors whose genitals or pubic areas were nude and exposed to view weighs heavily against the Third Circuit's finding that Knox possessed the requisite *scienter* to violate the statute. Knox's purported awareness that the videotapes contained "materials designed to sexually arouse a pedophile" (*United States v. Knox, supra,* 977 F.2d at 825 (PA 24)) is irrelevant to his guilt when no reasonable person could have believed that the depictions fell within the definition provided in 18 U.S.C. § 2256(2)(E). As the Third Circuit itself taught in *United States v. Villard, supra,* 885 F.2d at 125, "[w]hen a picture does not constitute child pornography . . . , it does not become child pornography because it is placed in the hands of a pedophile, or in a forum where pedophiles might enjoy it." *See also, Faloona v. Hustler Magazine, Inc.*, 607 F. Supp. 1341, 1344-45 (N.D. Texas 1985), affirmed *sub nom. Faloona by Frederickson v. Hustler Magazine, Inc.*, 799 F.2d 1000 (5th Cir. 1986) (since "the nude pictures [did] not show the plaintiffs engaging in any sexual conduct or performing any sexual activity," they were not "child pornography," notwithstanding their appearance in an "offensive" magazine like *Hustler*.) There is no question but that many legal materials – for instance, depictions of mere nudity, lascivious displays of breasts or buttocks, or "alluring" images such as those often found in fashion magazines and clothing catalogs – may be found to be arousing by individuals so inclined.

Under these circumstances, a reasonable mistake as to the legality of the materials must be a defense. In *United States v. United States District Court for Central Dist. of Cal.*, 858 F.2d 534 (9th Cir. 1988), the Ninth Circuit held that the First Amendment requires that a defendant charged with violating 18 U.S.C. § 2251(a) be entitled to an affirmative defense based on a reasonable mistake of age. In *United States v. X-Citement Video, Inc.*, 982 F.2d 1285 (9th Cir. 1992), the Ninth Circuit held 18 U.S.C. § 2252 unconstitutional because the statute failed to require proof of *scienter* that the materials distributed are child pornography. In *X-Citement Video*, the government argued that § 2252 required knowledge only of the "nature and character of the material":

> The government's position is a bit cagey; it suggests at times that the statute requires that the distributor know that the material is child pornography, but argues that it does not require that the distributor know the age of the performers. . . . What the government seems to be saying . . . , however, is that the statute does not even require that the defendant know that one or more performers was under the age of 18, so long as he knew the general nature of the materials he was distributing.

United States v. X-Citement Video, Inc., 982 F.2d at 1287.

The *X-Citement Video* court, which held § 2252 unconstitutional for failure to require knowledge that at least one of the persons depicted in the images in question was a minor, distinguished *United States District Court for the Central Dist. of Cal., supra*, because producers are in a far

different position from those who merely receive or transport visual images after they are fixed on film or videotape. Thus, while the Constitution merely requires the availability of an affirmative defense to producers charged under § 2251(a), the Ninth Circuit held that those charged under § 2252 cannot constitutionally be found guilty where they have not been charged with knowing that one of the persons depicted was under the age of 18.

In *United States v. Sherin*, 1987 WL 6146 (S.D.N.Y.), Judge Lowe, unlike the *X-Citement* court, judicially engrafted a *scienter* requirement onto 18 U.S.C. § 2252 to save it from unconstitutionality, but dismissed the indictment for failure to allege an essential element of the crime. These cases demonstrate that the Third Circuit's reliance on *Hamling v. United States*, 418 U.S. 87, 123, 94 S.Ct. 2887, 2910, 41 L.Ed.2d 590 (1974); *United States v. Brown*, 862 F.2d 1033 (3d Cir. 1988); and *United States v. Moncini*, 882 F.2d 401, 404 (9th Cir. 1989) is inappropriate to the facts in *Knox*.

Hamling, unlike Knox, was obviously aware that he was dealing with materials depicting "sexually explicit conduct" of the type that could be found to be obscene. Similarly, both Brown and Moncini knew they were dealing with "child pornography," that is, depictions of minors engaged in sexually explicit conduct. Brown merely believed that the illegal materials depicted adolescent children rather than pre-pubescent ones, while Moncini was not aware that mailing child pornography to the United States was illegal.

Knox, however, could rely on the Nather brochures, which not only stated that the videotapes were not child

pornography, but, more importantly, explained *why* they were not in a believable fashion. While the Nather brochure boasted that the viewer would be sexually aroused by the videotapes, the descriptions assured Knox and anyone else that the videotapes depicted no "sexually explicit conduct" as defined in 18 U.S.C. § 2256 because there was no "actual or simulated" sexual conduct (§§ 2256(2)(A), (B), (C), (D)) and no nudity of the genitals or pubic area (§ 2256(2)(E)). The brochures' claim that the depictions were legal was reasonable because it is corroborated by the plain language of the statute, the legislative history, and the pattern of enforcement. In both receiving and possessing the videotapes – unlike the defendants in *Moncini* or *Brown* – Knox had an objectively reasonable belief that the videotapes did not violate the law. Such a belief bars his conviction and must be permitted as a defense.

C. If there can be an "exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(E) where the genitals and pubic area are fully covered by clothing, then 18 U.S.C. § 2256(2)(E) is unconstitutionally vague and overbroad.

A statute which fails to provide adequate notice as to what conduct is prohibited is vague and cannot survive constitutional scrutiny. *Rabe v. Washington, supra,* 405 U.S. at 315 ("To avoid the constitutional vice of vagueness, it is necessary, at a minimum, that a statute give fair notice that certain conduct is proscribed.") Furthermore, if the Third Circuit's interpretation of the federal statute is allowed to stand and Congress is found to have intended to include within the definition of § 2256(2)(E) depictions

of minors whose genitals are fully covered, then the law, as drafted, is facially invalid for overbreadth, because the arguably impermissible applications of the statute are real and "substantial" and no longer "directed to the hard core of child pornography." *See New York v. Ferber, supra,* 458 U.S. at 773, 102 S.Ct. at 3363.

Depictions of minors in which their genitals and pubic areas are fully covered by clothing such as leotards, bathing suits, and underwear are undisputedly ubiquitous and can be found in newspapers, books, and magazines, clothing catalogs, family albums, on the walls of art museums, in movies and on television, at fashion shows, dance recitals, and gymnastics and swimming meets. It is hardly comforting that "the limiting principle in the statute is the requirement of lasciviousness," the meaning of which the Third Circuit has *admitted* is "far from crystal clear." *United States v. Knox, supra,* 977 F.2d 823 fn. 5. (PA 19).

If an "exhibition of the genitals or pubic area" can be satisfied by depictions of minors whose genitals are completely covered by an article of clothing, the chilling effect of the federal statute will be enormous. Anyone who has photographed a minor at a dance recital, swim or gymnastics meet, at the beach, or at home, will immediately understand the danger of photographing a minor in a pose which could ultimately be deemed to be lascivious under the law. Every image will have to be examined to insure that the clothing covering the genitals and pubic area does not accidently or purposefully end up as a "focal point" of the image (few images have one focal point), that the child doesn't look coy or appear to be striking an unnatural pose, or that the image doesn't contain any tell-tale signs of "lascivious" intent. The use

of telephoto or zoom lenses would become fraught with danger, since "zooming in" on subjects could result in an "unnatural focus" on the clothing covering the genitals or pubic area. The danger is present even in the privacy of one's own home, using digital enhancement techniques (now available on many home video systems), to enlarge areas of a videotaped image.

Family members and friends, professionals and documentarists will have to take care when photographing children playing dress-up where the clothing might be "inappropriate" and where the children might strike "alluring" poses in childish playfulness, even though their genitals are fully covered. Any photographs of a clothed child taken in the proximity of a bed – "a place associated with sexual activity"[15] – will be suspect.

Prosecuting authorities will receive unlimited power to "get" an unpopular person, a political opponent, or a personal enemy because of the newly-established ease of making this dramatic criminal charge.

Such overbreadth cannot constitutionally be tolerated. When the Supreme Court upheld as constitutional the New York child pornography statute in *New York v. Ferber, supra,* it did so because the New York statute listed the prohibited sexual acts "with sufficient precision."

> There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by

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[15] *United States v. Dost, supra* at 825.

> the applicable state law, as written or authoritatively construed. Here the nature of the harm to be combated requires that the state offense be limited to works that visually depict sexual conduct by children below a specified age. The category of "sexual conduct" proscribed must also be suitably limited and described.
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> * * *
>
> [The New York statute's] prohibition incorporates a definition of sexual conduct that comports with the above-stated principles . . . . The term "lewd exhibition of the genitals" is not unknown in this area and, indeed, was given in *Miller* as an example of a permissible regulation.

New York v. Ferber, 458 U.S. at 764-5, 102 S.Ct. at 3358-9.

The Supreme Court did *not* envision that the statute could be applied to depictions of clothed genitals and, in fact, warned:

> Nor will we assume that the New York courts will widen the possibly invalid reach of the statute *by giving an expansive construction* to the proscription on "lewd exhibition[s] of the genitals."

(Emphasis added). *New York v. Ferber, supra*, 458 U.S. at 773, 102 S.Ct. at 3363.

In expansively defining an "exhibition" to proscribe depictions of minors whose genitals are completely covered, the Third Circuit has violated not only *Ferber*'s constitutionally necessary admonition, but also a time-honored rule of statutory construction:

> When a federal court is dealing with a federal statute challenged as overbroad, it should, of

> course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction. [citations omitted].

New York v. Ferber, 458 U.S. at 769, 102 S.Ct. at 3361.

Rather than construe the statute narrowly, the Third Circuit gave it precisely the expansive construction against which the Supreme Court warned in *Ferber*, thereby criminalizing a "broad range of innocent conduct". Where, as here, there is no plain intent on the part of Congress that the statute "be so all-encompassing," such an expansive interpretation must be rejected. *United States v. Yip*, 930 F.2d 142, 149 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 197, 116 L.Ed.2d 157. *See also, Liparota v. United States, supra*, 471 U.S. 419, 426, 105 S.Ct 2084, 2088, 85 L.Ed.2d 434 (1985).

That Congress did not intend the statute to be so "all-encompassing" is obvious. Congress refrained from criminalizing not only mere nudity, but also "lascivious" depictions of uncovered breasts or buttocks.[16] Moreover, Congress defined the term "lascivious exhibition of the genitals" in the context of the phrase "sexually explicit conduct," which is defined in 18 U.S.C. § 2256 also to

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[16] Compare, for example, Connecticut Penal Code § 53a-193, which prohibits depictions of the genitals, pubic area, or buttocks "with less than a fully opaque covering . . . or the depiction of the covered male genitals in a discernibly turgid state." *See also*, Hawaii Penal Code, § 8707-750; Kansas Criminal Code, Article 35, § 21-3516; Mass. Penal Code, § 31; North Carolina Criminal Law, Article 26, § 14-190.13; Utah Criminal Code, Chapter 5a, § 76-5a-2; and Virginia Criminal Code, Article 6, § 18.2-390.

include sexual intercourse, bestiality, masturbation, and sadistic and masochistic abuse.

Although certain courts and prosecutors might wish to criminalize all depictions of minors which are "designed to sexually arouse a pedophile", we must heed Justice Brandeis' warning that

> [s]tatutes creating and defining crimes are not to be extended by intendment because the court thinks the legislature should have made them more comprehensive.

United States v. Weitzel, 246 U.S. 533, 543, 38 S.Ct. 381, 383, 62 L.Ed. 872, 875 (1918).

CONCLUSION

For all the reasons above, the conviction of Stephen A. Knox should be reversed, and a judgment of acquittal entered.

Respectfully submitted,

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